86-168

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1986

D.R. MERTENS, INC., *Appellant,*

v.

STATE OF FLORIDA, EX. REL., DEPARTMENT OF INSURANCE, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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July 15, 1986

78pp

QUESTION PRESENTED

Whether appellant was denied its constitutional right to due process and its contract unconstitutionally impaired when, based on § 631.291 (4)(b), Florida Statutes (1975), its claim for future damages for breach of contract was denied in a state insurance insolvency proceeding.

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v.

STATE OF FLORIDA, EX. REL.,
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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

D.R. MERTENS, INC., the appellant, appeals from a final judgment of the Supreme Court of the State of Florida, dated April 16, 1986. That judgment declined to review the decision of the District Court of Appeal for the First District which affirmed the Leon County Circuit Court's denial of appellant's claim for compensation in an insurance incolvency proceeding.[1]

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[1]D.L. Mertens, Inc., is a closely held corporation. It has no parent company, subsidiaries or affiliates.

OPINIONS BELOW

The memorandum opinion of the Supreme Court of Florida, which appears in the appendix hereto, has not yet been reported.

The opinion of the District Court of Appeal of Florida for the First District, which appears in the appendix hereto, is reported in 478 So.2d 1132 (Fla. 1985).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 16, 1986.

A notice of appeal to this Court was filed in the Supreme Court of Florida on June 13, 1986.

This appeal is being docketed in this Court within 90 days from the judgment of the court below. The jurisdiction of this Court is invoked under 28 U.S.C. S 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article One, Section Ten, United States Constitution:

No state shall . . . pass any law impairing the obligation of contracts . . .

Fifth Amendment, United States Constitution:

. . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Section 631.001, Florida Statutes (1975):

(1) Part I of chapter 631 may be cited as the "Insurers Rehabilitation and Liquidation Act."

(2) This part shall not be interpreted to limit the powers granted the Department of Insurance by other provisions of the law.

(3) This part shall be liberally construed to effect the purpose stated in subsection (4).

(4) The purpose of this part is the protection of the interests of insureds, creditors, and the public generally, through:

(a) Early detection of any potentially dangerous condition in an insurer and prompt application of appropriate corrective measures which are neither unduly harsh nor subject to unwarranted publicity needlessly damaging to the insurer;

(b) Enhanced efficiency and economy of liquidation through clarification and specification of the law to minimize legal uncertainty and litigation;

(c) Equitable apportionment of any unavoidable loss;

(d) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state.

Section 631.291, Florida Statutes (1975):

(1) No claim based upon a contract of insurance, suretyship, or indemnity shall be allowed or paid from the assets of an insurer in process of liquidation unless the event causing the loss to, or creating the liability of, the obligee of the contract shall have occurred prior to the order of liquidation or pursuant to the provisions of s. 631.252.

(2)(a) Claims of a third party shall not be deemed contingent, but shall be fairly evaluated even though liability has not been established by the date set forth in subsection (1) if:

1. It may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured;

2. Such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claim against such insurer arising out of his cause of action other than those already presented can be made;

3. The total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its maximum liability would be were it not in liquidation; and

4. The filing of such claim shall constitute a release of the insured from liability to the claimant to the amount of the claim so filed or the claimant shall otherwise so agree.

(b) Nothing in this subsection shall be construed to deny the right of an insured to file a claim in order to secure for himself the benefits under a liability insurance policy.

(3) No judgment against such an insured of the insurer taken after the date of entry of the liquidation order and no judgment against an insured or the insurer taken by default, or by collusion, prior to the entry of the liquidation order shall be considered as evidence in the liquidation proceedings as to liability of the amount of damages. No judgment or order against an insured or the insurer entered with 4 months prior to the entry of the liquidation order shall be considered as evidence of liability or the amount of damages.

(4)(a) Claims not covered by the provisions of subsection (1) shall not be allowed or paid from the assets of an insurer in process of liquidation unless:

1. The event, whether an act or omission, occurred prior to the date of the order of liquidation;

2. The goods were delivered or services were rendered prior to the order of liquidation; or

3. The duty to perform under a contract matured prior to the order of liquidation.

(b) Nothing in this subsection shall be deemed to extinguish or limit any rigght the receiver may otherwise have to cancel any contract or part thereof by virtue of any contractual provision or law of this state. It ahsll be the duty of every claimant under this subsection to mitigate and minimize any damage surrered as a result of a breach of contract upon entry of the order of liquidation. Recovery by any claimant under this subsection shall be limited to the actual damages suffered by virtue of a breach.

(5) The value of any security held by a secured creditor shall be determined under supervision of the court by:

(a) Converting the same into money according to the terms of the agreement pursuant to which the security was delivered to such creditor; or

(b) By agreement, arbitration, compromise, or litigation between the creditor and the receiver.

The amount so determined shall be credited upon the secured claim, and any deficiency shall be treated as an unsecured claim. If the claimant surrenders his security to the receiver, the entire claim shall be allowed as if unsecured.

HOW THE FEDERAL QUESTION WAS RAISED

The appellant first raised the constitutional claims of impairment of contract and taking without due process in the Leon County Circuit Court. Those claims were elaborated on in the appeal to the First District Court of Appeal, and were also part of the appellant's petition for discretionary certiorari to the Florida Superme Court.

The appellant's constitutional argument was made as part of its argument over interpretation of § 631.291 (4)(b), Florida Statutes (1975). It was the appellant's contention that the statute, which had not been judicially construed before, should be read to allow its' claim as any other result would be unconstitutional. The District Court of Appeal expressly rejected the appellant's constitutional arguments in the last paragraph of its opinion.

STATEMENT OF THE CASE

On December 23, 1975, Daniel R. Mertens and Florida Home Insurance Company entered into an agreement that appointed Mertens to be a representative and general managing agent for that company. In that capacity, Mertens was expected to solicit and appoint insurance agents, who would in turn sell the company's mobile home insurance to the public. In return, Mertens was to receive compensation based on the profitability of those policies as measured against their loss ratio. The contract between appellant Mertens and Florida Home Insurance Company provided for liquidated damages to Mertens in the event of cancellation. A formula was included for calculating those damages.

The agreement was amended, effective January 1, 1977, to substitute D.R. Mertens, Inc., for Daniel R. Mertens personally. D.R. Mertens, Inc., was the claimant in the original proceedings and is the appellant before this Court.

In performing its obligations under the contract, Mertens selected, solicited, and appointed the agents who sold Florida Home's mobile home policies to the public. It put together a complete program for that aspect of Florida Home's business, trained home office personnel, calculated risk ratings, made required filings with the Department of Insurance and performed many other tasks. The loss ratio

on run-off for the mobile home insurance policies was 13%, an excellent ratio.

Florida Home fell victim though to reverses in other areas of its business. On October 12, 1978, upon application by the Department of Insurance, an order of seizure was issued by the Leon County Circuit Court against Florida Home. By further order, dated December 11, 1978, the Department of Insurance was appointed receiver for Florida Home for purposes of rehabilitation. The Department of Insurance, as receiver, is the appellee in this case.

The Department of Insurance, as receiver, was notified in writing of Mertens' contract. Without notice to Mertens, however, on January 12, 1979, the Department was granted approval after an emergency hearing to enter into a reinsurance agreement with Protective Indemnity Insurance Company.

That agreement was represented to the circuit court by the Department of Insurance as providing for reinsurance of all outstanding Florida Home policies, which would result in all claims being paid and all agents getting their commissions. Yet Protective Indemnity was not authorized to write mobile home insurance and had no intention of seeking such authority. The receiver did not otherwise place the mobile home insurance business with any other company. As a result, as the mobile home policies lapsed, the commissions that would have been generated by that aspect of the company's business were lost. Mertens thus lost his compensation based on future commissions for the profitable mobile home insurance business he had developed for Florida Home.

By further court order, dated March 7, 1979, Florida Home was placed in liquidation. Mertens timely filed its claim for compensation based on breach of its contract with Florida Home. The liquidated damages part of Mertens'

claim amounted to $290,198.76. The receiver recommended that compensation for commissions for the two years prior to liquidation be allowed, but that the liquidated damages portion based on breach of Mertens' contract for future damages be disallowed.

At hearing, Mertens offered testimony that supported its liquidated damages calculation and also offered an alternative calculation for lost profits of $200,903.63. It was pointed out that the Department of Insurance, as receiver, had even disallowed Mertens' commissions on policies that were in force but would run out in 1979 after the order of liquidation.

The Leon County Circuit Court issued its order on June 28, 1984, allowing Mertens' claim only to the extent recommended by the Department of Insurance as receiver. Mertens' motion for reconsideration was denied on October 11, 1984. Mertens then appealed to the District Court of Appeal for the First District. That court's opinion on November 15, 1985, affirmed the decision of the circuit court and is the only judicial decision which offers any defense of the statute at issue. A petition for rehearing en banc before that court was denied. A petition to initiate discretionary certiotati jurisdiction was denied without opinion by the Florida Supreme Court on April 16, 1986.

THE QUESTION IS SUBSTANTIAL

Federal law allows the states to supervise insurance company insolvencies. State schemes have been upheld as an exercise of state police power due to the public interest in orderly and equitable resolution of insurance insolvencies. States appoint and become receivers, continue or discharge contracts, arrange for reinsurance of policyholders, guarantee policies, collect assets, and pay claims. Due process applies to those actions, separately and in sum. Yet,

how does it apply, and what limits does due process set on the disallowance of creditor claims?

Broadly stated, substantive due process means protection from arbitrary actions. Reasonableness is the standard by which the disputed action is judged. In appraising statutes, the legislative purpose must be permissable, and the means selected not arbitrary or improperly discriminatory. See, e.g. *Home Building & Loan Ass'n. v. Blaisedell*, 290 U.S. 398 (1934); *Block v. Hirsh*, 256 U.S. 135 (1921); and W. HURST, DEALING WITH STATUTES (1982), at 78-81. The appellant's argument in this case is especially within the realm of judicial expertise. It requires not fact-finding, but appraisal of a statute's purpose and the reasonableness of its departures from settled legal principles.

As interpreted by Florida's courts, the essence of § 631.291 (4)(b), Florida Statutes (1975), the statute under challenge, is to disallow unsecured creditor claims for "future damages." Other interpretations of the statute are plausible, but we are bound by the one adopted by Florida's courts. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, at 688 (1959). In the context of Florida insurance insolvency proceedings, "future damages" means damages becoming due after the date of liquidation of the insolvent insurer. Both the apparent statutory purpose of § 631.291 (4)(b), Florida Statutes (1975) and the means chosen to implement it are violative of substantive due process. An additional constitutional dimension is present in that, absent valid statutory justification, the disallowance of the appellant's claim constitutes an impermissible impairment of contract.

The general purpose of Florida's statutory insurance insolvency scheme is an orderly and equitable resolution of insurance company insolvencies. § 631.001 (4), Florida Statutes (1975). However, as to § 631.291 (4)(b), Florida Statutes (1975), the specific statute under challenge, no pur-

pose has ever been adduced in its defense by either the appellee or by the courts below. Nevertheless, the purpose of the statute seems readily apparent: to reduce the cumulative total of creditor claims against insolvent insurance companies.

Bluntly put, Florida's purpose in § 631.291 (4)(b), Florida Statutes (1975) is to stiff some of the creditors of insolvent insurers. That purpose is beyond and inconsistent with the state's legitimate interest in an orderly and equitable resolution of insurance insolvencies. In this instance, an illegitimate purpose requires arbitrary means: inevitably, some creditor claims that are otherwise meritorious are disallowed.

§ 631.291 (4)(b), Florida Statutes (1975) completely disallows claims for "future damages." The state takes the creditor interest in "future damages" as part of its public purpose in its scheme of resolving insurance insolvencies. Claimants such as Mertens' have their claims for "future damages" taken by the state for the benefit of creditors claiming other types of damages. The state scheme is not just a lesser preference for "future damages" claims, but is a taking by way of complete disallowance of such damages so as to favor other creditor claims all the more.

Other than for the purposes of this statute, future damages usually means damages that will be experienced in the future, but that are calculated for present valuation. Ordinarily, a calculation of future damages implies an award in the present. Damages for the future are calculated differently than damages already suffered, but the distinction is not one that contemplates disallowance of damages for the future. Yet that is what § 631.291 (4)(b), Florida Statutes (1975) does to creditors of insolvent insurers: it overthrows the common meaning of future damages so as to provide a means by which to disallow claims for such damages. The statute subverts a term and a principle developed as a

means of calculating and awarding future damages into a means of denying them at all.

In order to give its novel and arbitrary principle full effect, § 631.291 (4)(b), Florida Statutes (1975) does further violence to established principles of the law of contracts and damages. In any other context, damages are almost always accelerated and reduced to present value. A creditor on a promissory note, for example, may demand not just past due payments, but future payments of principal as well. Other contract creditors may also accelerate their right to collect damages for breach of contract. Indeed, acceleration of damages is so compelling and established a principle that it is hard to imagine contract and damages law without it.

However, § 631.291 (4)(b), Florida Statutes (1975), a promissory note creditor can claim past due payments, but would be disallowed the balance of the principal that would have fallen due after the date of liquidation. Or an injured third party to whom an insolvent insurer is primarily liable (on other than an insurance policy) would be entitled to damages suffered up to the date of liquidation, but would be disallowed any claim for damages after that date.

Logically, there are no bounds to the principle of § 631.291 (4)(b), Florida Statutes (1975). Even creditor claims that had matured and been accelerated long before liquidation would be disallowed to the extent those claims included future damages. A creditor who had accelerated a note and sued on it long before liquidation would find his claim reduced to those payments that would have been made up until liquidation and would be disallowed for the "future damages" of payments that would have fallen due after liquidation.

In this case, the appellant Mertens took contractual precautions to protect his right to future compensation.

Mertens' role in the development of the business was unique. Mertens did not sell policies to the public, but instead recruited the agents who did and trained the insurer's home office personnel. Mertens' efforts were successful and profitable for the insurer, but it fell prey to reverses in other areas of its business.

In return for his immediate expense and effort, Mertens was to be compensated in proportion to the commissions generated on that aspect of the insurer's business he was responsible for developing. Mertens' contract with the insurer calls for liquidated damages if future compensation was not paid. Mertens' claim in the trial court was supported by testimony that offered a choice of either the liquidated damages formula or a calculation of lost profits. In short, Mertens did everything that the law of contracts and damages called for, yet his claim was disallowed due to § 631.291 (4)(b), Florida Statutes (1975). In no other proceeding would Mertens suffer such a result. In any other context, Mertens' claim would have been allowed. Instead, Mertens lost all claim to the bulk of the compensation due. Indeed, due to the lack of notice to Mertens if the hearing, it was denied even the opportunity to contest the reinsurance contract which failed to provide for continuation of its portion of Florida Home's business.

The offense to due process that § 631.291 (4)(b), Florida Statutes (1975) presents is both as to its purpose and means. The purpose - to reduce meritorious creditor claims - is illegitimate because it has no justification in the state's police power and transgresses the state's obligation to deal equitably with all creditors. The means chosen - a disallowance of "future damages" - is arbitrary and unreasonable because it does violence to compelling and settled principles of the law of contracts and damages. § 631.291 (4)(b), Florida Statutes (1975) is unreasonable in its disallowance of Mertens' claim for future damages and should be overthrown.

The requirements of due process are comprehensive. § 631.291 (4)(b), Florida Statutes (1975) must meet those requirements, or be overturned if it does not. Contracts, even insurance contracts, are property which cannot be taken without due process. *Lynch v. United States*, 292 U.S. 571 (1934). In Neblett v. Carpenter, 305 U.S. 297 (1938), this Court upheld a state insurance insolvency plan against the claim that it was an unconstitutional taking without due process and an impairment of contract. The plan approved in that case, unlike the present one, provided for equitable payment of all claims to the extent assets were available. *Neblett, supra*, is a clear statement from this Court that state insurance insolvency proceedings are subject to the requirements of due process.

The constitutional issues raised by the appellant were not properly considered by the courts below. Based on *Neblett, supra*, the appellant framed the constitutional arguments as a due process challenge to the impairment and taking of appellant's contract rights without compensation. The receiver and the District Court of Appeal defended the taking as based on the statute, and the statute was defended on the basis that agent's commissions were not vested in insurance insolvency proceedings.

Such reasoning is distressingly slipshod and a travesty of statutory due process analysis. First, the statute at issue is broader in scope than just future commissions. It bars all creditor claims for future damages, not just those claims based on commissions. Second, if the statute is supported by an obscure supposed principle of insurance insolvency proceedings, what supports that principle against the requirements of due process? Third, the test of a statute against a substantive due process claim requires analysis of the statute's purpose and means with a view toward its reasonableness against claims that it is arbitrary. None of the courts below ever made such an analysis. Each of these

three points are fatal to the District Court's defense of the statute. The appellant's constitutional challenge stands unrefuted. Indeed, it was not even properly addressed in the courts below.

The question posed by the appellant's constitutional challenge remains unanswered: on what basis does Florida's statutory bar to claims for future damages pass the tests of due process? How are the purpose and means of the statute upheld? Without doubt, due process applies to insurance insolvency proceedings. Yet neither the appellee, nor the courts below, not the cases relied on, offer a credible defense to the Appellant's constitutional challenge of § 631.291 (4)(b), Florida Statutes (1975). It rests with this court to vindicate the appellant's constitutional rights by overturning § 631.291 (4)(b), Florida Statutes (1975).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Jurisdictional Statement and Appendix were served on Chester G. Senf, Counsel of Record for the State of Florida, Department of Insurance, by mailing the same to him by regular U.S. Mail at Post Office Box 110, Tallahassee, Florida 32302, this _____day of July, 1986.

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APPENDIX A

IN THE
CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

CASE NO. 79-532

STATE OF FLORIDA, ex rel.,
The Department of Insurance
of the State of Florida,

Relator,

vs.

FLORIDA HOME INSURANCE COMPANY,
a Florida corporation authorized
to transact an insurance business
in Florida,

Defendant.

D.R. MERTENS, INC.'S
REBUTTAL MEMORANDUM

REPLY TO INTRODUCTION

The RECEIVER throughout this Memorandum proposes hypothetical arguments based upon the assumption that the RECEIVER could have cancelled the insurance policies. However, the RECEIVER actually assumed the policies and the Orders of Rehabilitation and Liquidation authorize the policies' continuance. The RECEIVER was ordered, when it was appointed to rehabilitate FLORIDA HOME INSURANCE COMPANY:

A. To conduct the business of the insuror.

B. To negotiate for the reinsurance or assumption of the business.

C. Not to notify parties in interest of the insuror's insolvency, which is normally required under F.S. 6 31.101(2).

D. Not to cancel or to permit the cancellation of any policies *and* all agents were enjoined not to cancel policies; this having the effect of compelling agents' continued employment.

D.R. MERTENS, INC. made efforts to place the mobile home business with another carrier and as soon as it became aware of the receivership, informed the RECEIVER in writing of its interest in the business. The RECEIVER ignored this and reinsured the policies with a company that ..ould not and could not lawfully continue the business. This is an anticipatory repudiation of the contract. D.R. MERTENS, INC. was not given prior notice of the reinsurance and upon finding out post-event that the policies had already been placed abandoned the efforts to place the business.

F.S. 631.291 does not act to bar the claim of D.R. MERTENS, INC. because the claim of D.R. MERTENS,

INC. did mature prior to the Order of Liquidation: the anticipatory breach of the contract occurred no later than the date when the policies were reinsured, January 12, 1979, and the Liquidation Order was entered March 7, 1979.

The RECEIVER claims it disaffirmed the contract of D.R. MERTENS, INC. as a matter of law under F.S. 631.251 and 631.291. As noted above, the Court expressly ordered the RECEIVER to continue the insurance business of FLORIDA HOME and F.S. 631.101(1) requires the RECEIVER "to conduct the business" of the company which it is rehabilitating. This business consists of the policies produced by D.R. MERTENS, INC. The RECEIVER, by Court Order, continued, ratified and affirmed the policies, all produced under the D.R. MERTENS, INC. managing general agency contract. What the RECEIVER has obfuscated throughout this proceeding is that the RECEIVER, by Court Order and statutory command, undertook to continue to run FLORIDA HOME's business. Why did it continue the insurance? The RECEIVER's explanation in the Motion for Approval of the Reinsurance Contract states four reasons:

A. avoid policyholder losses;

B. avoid claimants' losses;

C. *insure that agents will not lose unearned commissions*; and

D. lessen claims.

Additionally, the RECEIVER under this agreement earned a 35% ceding commission on all collected premiums. All agents, except D.R. MERTENS, INC., were paid their claims in full and were paid for work done after the Order of Liquidation. *But there is no specific Court Order allowing the payment to these agents or ratifying their agency agree-*

ments, nor was specific approval sought to continue to pay agents. Why is this so? *Because this authority is inherent in the Court's Orders allowing the RECEIVER to enter into the reinsurance agreements* and in the Order of Liquidation which notes that all policies will remain in force. In *Real Estate Marketers, Inc. v. Wheeler*, 298 So. 2d 481 (1 D.C.A., 1974), the First District Court of Appeals in reversing an Order in a Leon County Circuit Court receivership held:

> "In his order, the trial judge recited * * * that generally, a receiver is not obligated to carry out the executory contracts of the owner of the estate being administered unless he elects to be bound thereby. In so holding he was imminently correct. However, he went on to hold that the receiver has the option of determining whether or not he would bide (sic) by the contract with the broker with regard to the amount of the commission to be paid. In that holding he erred.
>
> * * *
>
> "a receiver does indeed have the option of either accepting or rejecting executory contracts. *However, once having elected to accept a contract, he is bound thereby. While he may pick which contracts he will honor, he may not pick which parts of a contract he will honor.* * * *" (Emphasis supplied) 298 So. 2d 481 at 483-484. (A copy of this Opinion is attached hereto as Exhibit 'A'.)

Thus, having assumed the insurance contracts, the RECEIVER assumed all parts of the contract by law. The RECEIVER's actions show as much because all agents, policyholders and claimants were paid in full and the RECEIVER was paid its ceding commission of 35%. F.S. 631.001(4)(c) provides that a purpose of the Insurance Liquidation Code is to achieve "equitable apportionment of any

unavoidable loss". That all others associated with this business were paid in full and D.R. MERTENS, INC. was not paid at all is not equitable apportioning of the loss.

The RECEIVER is asking the Court to approve a transaction whereby it received a ceding commission, where all other agents were paid except for the managing general agent who produced the business and where the managing general agent is to bear the entire loss and where the RECEIVER is to reap a windfall. This is contrary to the statutory goals of the receivership.

POWER OF STATES TO MODIFY CONTRACTS IN INSURANCE RECEIVERSHIPS

Neblett v. Carpenter, 305 U.S. 297, 83L. ed 182 (1938), and *Carpenter v. Pacific Mutual Life Insurance Co. of California*, 74 P.2d 761 (Cal., 1938), (hereafter "Pacific Mutual" cases), cited by the RECEIVER, both concern a plan where the Insurance Department of California restructured the affairs of an insolvent insuror by forming a new company with assets from the insolvent insuror. Certain business that was not on a sound actuarial basis was rewritten by the new company on a reduced benefits basis. The Supreme Court of California in *Carpenter v. Pacific Mutual Life Insurance Co. of California*, 74 P.2d 761 (Cal., 1938), upheld the plan against constitutional attack only because any person not desiring the lesser benefits offered by the new company was absolutely privileged to dissent and had the absolute right to *file a claim for their full damages based upon contractual performance under the original policies.* The claims were to be paid in part immediately and then by profits from the new company — no profits were to go to any other source until the claims were satisfied. *Carpenter*, 74 P.2d at 778. The United States Supreme Court again upheld the plan against constitutional claims of taking of

property without due process and impairment of contracts because the dissenters could prove claims for the full amount of their damages and would receive their proportional part of the assets. *Neblett v. Carpenter*, 305 U.S. 297 at 304-305, 83 L. ed 182 at 188-189 (1938).

Consequently, the allowance of a claim for the amount of damages incurred, based upon performance in full of the original contract, is a constitutional necessity for a state to alter contracts in receiverships. D.R. MERTENS, INC. must be equally treated.

THE RECEIVER ADOPTED D.R. MERTENS, INC.'S CONTRACT

The *Real Estate Marketers, Inc.* opinion cited in the "Introduction" compels the legal conclusion that the RECEIVER has adopted the insurance contracts and D.R. MERTENS, INC.'s contract. The managing general agent's contract entered into by D.R. MERTENS, INC. and FLORIDA HOME resulted in D.R. MERTENS, INC. producing a "turn key" mobile home business for FLORIDA HOME. The commission was in payment for many services provided by D.R. MERTENS, INC. to the company which were not otherwise compensated, such as preparing filings before the Insurance Commission, training underwriters, training claims agents, rating thousands of mobile home parks and appointing agents to produce and service the policies. The payment of the commissions to D.R. MERTENS, INC. is a contractual charge upon the policies and cannot be separated from the policies. Under the *Pacific Mutual* cases the claim must be allowed if the contract is anticipatorily breached for the RECEIVER's purposes.

The contract between D.R. MERTENS, INC. and FLORIDA HOME was terminated by the RECEIVER

after its affirmance when the RECEIVER anticipatorily repudiated the contract. Even given that the contract was terminable at will, the right to terminate the agreement is conditioned upon the payment of the liquidated damages. The contract also provides that the contingent commissions are to continue even if the business is reinsured or otherwise assigned. In either event, under the plain language of the contract, the commissions must be paid to D.R. MERTENS, INC.

THE RECEIVER BREACHED THE CONTRACT

The cases cited by the RECEIVER here and in its Supplemental Memorandum are all inapplicable to the present case because the RECEIVER in all of the cited cases cancelled the policies. Here the policies *were not cancelled*. The many cases cited in D.R. MERTENS, INC.'s Reply Memorandum all concern policies reinsured or ceded and prove that such assignment can operate as a breach. When such an assignment places it out of the ability of the insuror to perform its contract with an agent, there is an anticipatory breach for which damages are awarded to the agent.

The RECEIVER inaccurately claims that the contract between D.R. MERTENS, INC. and FLORIDA HOME allows FLORIDA HOME to escape paying commissions by not writing any policies. It is elementary contract law that such representative agreements "* * * impose an obligation to use best efforts to promote the sale * * * and to supply them [the goods or services for sale]." Restatement of Contracts 2d, Section 77, illustration 9. Accord. *Wood v. Lucy, Lady Duff Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). If FLORIDA HOME stopped writing insurance under the Representative Agreement, it would breach the contract.

The RECEIVER's claim that the insurance was not saleable is not based on the record. The book of business ran

out at an excellent 13% loss ratio. Mr. Mertens, an expert on insurance, testified that loss ratios below 20% are considered to be excellent in the insurance business. Thus the book was saleable. D.R. MERTENS, INC. did all it could to place the business with a new carrier but before it could do so, the RECEIVER had reinsured the policies without any notice to D.R. MERTENS, INC. The RECEIVER when assuming the policies should have protected D.R. MERTENS, INC as it had put the RECEIVER on notice of its interest in the business. Notwithstanding this notice, the RECEIVER chose to reinsure the policies without protecting D.R. MERTENS, INC. or even giving it notice of the proposed action. Under the *Pacific Mutual* cases, D.R. MERTENS, INC. must be allowed a claim for its full damages based upon contract performance.

The RECEIVER suggests that it was necessary for D.R. MERTENS, INC. to seek to pick up the book of business from PROTECTIVE INDEMNITY INSURANCE CO. OF FLORIDA, INC. This futile act is not required to mitigate damages since PROTECTIVE could not lawfully renew the policies and since the anticipatory breach had already occurred.

D.R. MERTENS, INC.'S CONSTITUTIONAL RIGHTS WILL BE VIOLATED IF IT IS NOT ALLOWED A CLAIM FOR THE FULL AMOUNT OF ITS DAMAGES

The current Federal Bankruptcy Act meets the constitutional standards of due process because if any executory contracts are rejected, a claim must be allowed for all damages suffered and if executory contracts are continued, the Trustee in Bankruptcy must provide adequate assurance of performance in full of all contractual obligations. Further, if the adequate protection is insufficient, the

claim becomes a superpriority above all other expenses. Such claims for adequate assurance are all paid 100 cents on the dollar. D.R. MERTENS, INC. is only requesting a general claim although it is arguably entitled to full payment as an expense of administration. D.R. MERTENS, INC. has had its contractual rights condemned and taken by the State. The policies, once assumed, bind the RECEIVER and D.R. MERTENS, INC.'s property rights may not be taken without payment of compensation. U.S. Constitution, Amendments 5 and 14. The RECEIVER, as statutory successor to FLORIDA HOME, is bound by ordinary contract law.

If the State may by the terms of the Insurance Liquidation Code take property without compensation or notice and a hearing, this procedure is constitutionally defective. If the Insurance Code permits the RECEIVER to modify rights in contracts without payment, then it is a plain case of State impairment of contract. The claim must be allowed under *Pacific Mutual.*

D.R. MERTENS, INC. HAS ADEQUATELY PROVEN ITS DAMAGES

The RECEIVER claims that it was not provided sufficient information to evaluate the claim. Firstly, under F.S. 631.181 (b) (2) (a) (c) the RECEIVER may demand additional information to clarify a claim and may compel testimony to investigate claims. This was never done and consequently the RECEIVER is estopped to request more documents at this late time. The Court's attention is invited to Exhibit "B", in which D.R. MERTENS, INC. requests judicial notice. This Motion by the RECEIVER notes that the RECEIVER possesses the documents of the corporation and invites inspection therein. The RECEIVER has by Order of this Court taken possession of these records and

should now have all of the books and records of the company. The RECEIVER also was provided a detailed accounting of the claim and was twice provided with the contract the claim is based upon.

The RECEIVER cites the *Columbia Bank v. Okeelanta Sugar*, 52 So.2d 670 (Fla., 1951) case as the proper standard for the amount of proof necessary in a receivership. The case is inapplicable because the claimant in *Columbia Bank* was seeking a constructive trust and a priority. D.R. MERTENS, INC. only seeks a general claim and thus the character of proof necessary is that of any ordinary contract litigant.

The RECEIVER claims that particular forms of words are necessary to create a provision for liquidated damages. This is untrue, as a Court will determine this intent regardless of the labels placed thereon by the parties. See 17 Fla. Jur. 2d, Damages, Section 99 and Section 101. In fact the use or nonuse of the term liquidated damages is not dispositive. Ibid, Section 101. If the stipulation meets the test previously set out in the Memoranda by the Claimant [uncertainty at time of contracting, etc.], the Courts uphold the stipulation, regardless of its drafting.

The fact that the RECEIVER protests so much that the claimant has not proven its damages to the penny *proves* that liquidated damages are appropriate. The task of setting out precise damages at the time the contract was entered into would have been impossible.

The Section captioned "Section C: Unpaid Commissions" is based upon " 'facts' " contained in two ex parte Affidavits filed after the close of testimony by employees of the RECEIVER. The RECEIVER claims that these Affidavits were "requested" but one searches in vain for such a request in the record. These Affidavits are rank hearsay, inadmissable and self-serving. There will be no opportun-

ity to cross-examine the affiants. As employees of the RECEIVER, these Affidavits are highly questionable as biased. The argument contained in this section is all premised on the " 'facts' " contained in the inadmissable Affidavits. Since there is no admissable basis for these statements, the argument should either be stricken or ignored.

The testimony of Mr. Turner, a C.P.A., simply established the profits of D.R. MERTENS, INC. to provide the Court with an alternative basis for calculating damages. Mr. Turner testified that he received the stipulation of the parties and prepared his worksheet based upon the stipulated premiums, expenses and loss figures. D.R. MERTENS, INC. is not claiming the 1979 runoff — nor does Mr. Turner's testimony related thereto — D.R. MERTENS, INC. is claiming either liquidated damages or lost profits. Either figure *includes, necessarily*, a provision for the 1979 runoff profits which should have been received. Thus a great deal of the RECEIVER's argument based on D.R. MERTENS, INC. now "claiming" 1979 runoff damages is misguided.

The RECEIVER's acts in breaching the contract have rendered calculating exact damages impossible. But the testimony and the income tax records in evidence before the Court show that substantial profits were gained. The arithmetical calculations made by Mr. Turner, qualified as an expert, further establish the reasonableness of the profit figures. D.R. MERTENS, INC. has presented sufficient proof to the Court to entitle it to recover liquidated damages or lost profits, especially given the RECEIVER's wrongful breach.

INTEREST

On page 18 the RECEIVER notes that D.R. MERTENS, INC. waived its claim for interest. On page 6 of the Post

Trial Memorandum D.R. MERTENS, INC. waived its interest claims. The argument presented here is brutum fulmen.

CONCLUSION

This is a relatively simple matter of contract law now before the Court. The facts before the Court:

A. The RECEIVER assumed the FLORIDA HOME business.

B. The contract between FLORIDA HOME and D.R. MERTENS, INC. provides that upon any termination the contingent commission shall be paid for five years.

C. The contract between FLORIDA HOME and D.R. MERTENS, INC. also provides that commissions are to be continued even upon assignment or reinsurance of the business.

D. D.R. MERTENS, INC. notified the RECEIVER of its interest in the business and desire to find a carrier to replace FLORIDA HOME.

E. Without replying to D.R. MERTENS, INC.'s offer and without prior notice to D.R. MERTENS, INC., the RECEIVER reinsured the policies with a carrier who could not lawfully renew the policies and had no intention of renewing the policies.

F. All agents, claimants, policyholders as well as the RECEIVER were paid in full; D.R. MERTENS, INC. was the only party not paid.

It is basic contract law that a party assuming a contract, even a RECEIVER, assumes both the privileges and burdens of the contract. A RECEIVER assuming an executory contract assumes, by operation

of law, the entire contract. If the RECEIVER assumes the contract but seeks to breach or modify it, the other contracting party's consent to the novation or modification is necessary. If there is no agreement, the contract is breached and damages must be allowed therefor.

There is no legal authority for the INSURANCE DEPARTMENT to deprive one of a vested property right or to require, at will, without any consequences, the obligations of the insuror. In assuming the policies and the business, D.R. MERTENS, INC. must be dealt with: it is fundamentally unfair and not constitutionally permitted for the RECEIVER to protect all others and itself and fail and refuse to pay an obligation of equal dignity and legal efficacy as the other obligations it assumed and paid. It is also basic contract law that placing a contract out of one's ability to perform is an anticipatory breach of contract. Thus D.R. MERTENS, INC. must be allowed a claim for its full damages as measured by the liquidated damages clause or the loss of profits shown by uncontradicted testimony.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing D.R. MERTENS, INC.'S REBUTTAL MEMORANDUM has been furnished by regular U.S. Mail to Dennis K. Threadgill, Esquire, Division of Rehabilitation and Liquidation, Post Office Box 110, Tallahassee, Florida 32302, this 16th day of February, 1984.

ROBERT E. GIBSON
Suite 210
1020 East Lafayette Street
Tallahassee, Florida 32301
(904) 877-7139

Attorney for Claimant,
D.R. MERTENS, INC.

IN THE
CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

CASE NO. 79-532

STATE OF FLORIDA, ex rel.,
The Department of Insurance
of the State of Florida,

Relator,

vs.

FLORIDA HOME INSURANCE COMPANY,
a Florida corporation authorized
to transact an insurance business
in Florida,

Defendant.

FINAL ORDER ON CLAIM OF
D.R. MERTENS, INC.

FINAL ORDER ON CLAIM OF D.R. MERTENS, INC.

This cause came on to be heard upon Receiver's Motion to Determine the Validity of Mertens' Objection to Receiver's Final Report, and the Court having heard testimony of witnesses, reviewed evidence and argument and memoranda of counsel and being otherwise advised in the premises finds, as follows:

In December, 1975, D.R. Mertens entered into an agency agreement with Respondent insurance company which provided in essence that Mertens could appoint agents to write mobile home insurance. Mertens would receive a commission on all business produced by his agents and accepted by Respondent company. Paragraph 18 of the agreement provided that if the agreement is cancelled by either party, for any reason, Mertens would continue to receive his commissions for a period of five additional years on all such insurance produced by his agents and written by the Respondent company.

On October 12, 1978, this Court entered an Order seizing Respondent company and enjoined any further transaction of business. Subsequent to that date, Mertens agents produced no business for Respondent company and Respondent did not accept or write any new or renewal business.

On January 1, 1979, the policies in effect were ceded to Protective Indemnity Insurance Company on a run-off basis until the policies lapsed or were cancelled.

On March 7, 1979, an Order of Liquidation was entered. Section 631.251, F.S. (1975) fixing the rights of creditors as of the date of the Order of Liquidation.

Thereafter, in October, 1979, Mertens filed a claim in the receivership for earned but unpaid commissions for the

years 1977 and 1978 in the amount of $64,236.63, interest from January 15, 1978 to December 31, 1979 in the amount of $4,389.79, and for contingent commissions for five years, 1979 through 1983, for commissions which he presumes would be earned if the Respondent company had remained in business and if the Mertens agents would have continued producing business at the same rate for five subsequent years, which claim was in the amount of $290,198.76.

The Receiver, as an officer of the Court, evaluated Mertens' claims and recommended payment of the earned but unpaid commissions for 1977 and 1978 in the amount of $64,236.63, denying the remainder of the claims. Mertens thereafter filed an objection to Receiver's recommendation and a final hearing was had.

The Court finds, as a matter of law, that Mertens' claim for contingent commissions for the five years subsequent to the date of liquidation is without merit. Not only are such claims not authorized by statute, but are dehors the clear language of the contract upon which they are found. This contract between Mertens and Respondent company clearly contemplated that contingent commissions were to be based on two factors. First, Mertens' agents must produce business and, secondly, the company must accept and write the business produced by Mertens' agents. In the instant case, the agents produced no business after October 12, 1978 and the company wrote no business subsequent to that date. It seems clear that the contract between Mertens and Respondent company did not contemplate hypothetical or conjectural commissions.

The Receiver recommends and the Court concurs that D.R. Mertens, Inc. is entitled to be paid $64, 236.63 for earned but unpaid commissions for the years 1977 and 1978. Mertens' claim for interest on these unpaid commissions is approved as to amount but can only be paid by

the Receiver if all clains in its class are paid in-full. Otherwise stated, Mertens' interest claim must go into the 'pot'. Whether it and other claims in this class will ultimately be paid in-full or in-part will depend upon the amounts available to pay this class of claims.

The premises considered, it is therefore ORDERED and ADJUDGED that the claim of D.R. Mertens, Inc. for earned but unpaid commissions for the years 1977 and 1978 in the amount of $64,236.63 is granted and shall be paid pro-rata in the distribution of the assets of Respondent company.

It is further ORDERED and ADJUDGED that Mertens' claim for contingent commissions is denied.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 28th day of June, 1984.

CHARLES E. MINER, JR.
Circuit Judge

Copies to:
Chester G. Senf
Attorney for Receiver

Robert E. Gibson, Esquire

IN THE
CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA

CASE NO. 79-532

STATE OF FLORIDA, ex rel.,
The Department of Insurance
of the State of Florida,

Relator,

vs.

FLORIDA HOME INSURANCE COMPANY,
a Florida corporation authorized
to transact an insurance business
in Florida,

Defendant.

**MOTION FOR RECONSIDERATION
OF FINAL ORDER ON CLAIM
OF D.R. MERTENS, INC.**

MOTION FOR RECONDSIDERATION OF FINAL ORDER ON CLAIM OF D.R. MERTENS, INC.

D.R. Mertens, Inc., by its attorneys, moves for the Court, pursuant to Fla.R.Civ.Pro. 1.530, to reconsider its Order dated June 28, 1984, denying D.R. Mertens, Inc.'s objection to the Final Report of the Receiver, and would show:

1. The Court's Order herein may have overlooked the legal and constitutional issues raised by the Receivers continuing the mobile home policies of Florida Home and subsequently assigning them to Protective Indemnity Insurance Company. The facts adduced at the hearing upon D.R. Mertens, Inc.'s claim provided the following facts which stand uncontroverted:

a. The Company was seized by Court Order upon application of the Insurance Commissioner. The Receiver *was ordered to continue the policies in force and to negotiate with other carriers to continue the business.* (See composite Exhibit "A" to D.R. Mertens, Inc. Reply Memorandum.)

b. The Receiver complied with this Order and specifically sent to the D.R. Mertens, Inc. appointed agents a letter instructing the agents to *continue* the policies. (See Exhibit "B" of Reply Memorandum.)

c. The agents continued their representation of the company and *were paid their commissions in full.* (Transcript - 2, 7)

d. Upon learning that Florida Home Insurance Co. had been placed in rehabilitation, D.R. Mertens, Inc. contacted the Receiver and offered to find a carrier to replace Florida Home. D.R. Mertens, Inc., although the Receiver had taken possession of the records of Florida Home, at this time notified the Receiver of its interest in the

business and the commissions due to it. (See, Transcript - 13)

e. With Court approval, the mobile home policies were *not* cancelled and were sold to Protective Indemnity. (Transcript - 14)

f. The reinsurors were paid their premiums in full by the Receiver. The claimants and policyholders were fully protected by the Receiver. The Receiver paid the insurance agents their commissions in full. The Receiver himself, when the policies were ceded, received a ceding commission on the Florida Home mobile home policies. (Transcript - 27)

g. The only party left unpaid was D.R. Mertens, Inc. Thus, it is an uncontradicted fact, proven by documents in the record of the Receivership, that the Receiver continued the policies and the insurance business of the company. The law is equally as clear: in *Real Estate Marketers, Inc. v. Wheeler*, 298 So.2d 481 (1st DCA 1974), the Court held that a Receiver, once he determines to accept a contract, accepts the contract in whole as a matter of law. Based upon this holding and the uncontradicted testimony, the Receiver cannot have adopted the insurance policies without adopting all of the obligations attached thereto, in the same fashion that a Receiver cannot accept a contract to sell real estate without also paying the contracted commission rate.

Having accepted the contract and being bound by it, the Receiver then breached the contract by placing the contract out of its ability to perform. The damages for the destruction of D.R. Mertens, Inc.'s business were established as loss of profits by the testimony of Mr. Turner.

2. The Court's Order does not address F.S. 631.001 (A)(c), which statute requires that the purpose of insurance company liquidations is to achieve "equitable apportionment of any unavoidable loss." The uncontroverted court documents herein establish that the policyholders, claimants, insurance agents as well as the Receiver were protected and paid. That only one party remained totally unpaid and suffered the destruction of its business while the other parties were made whole is not in conformity with the statutory mandate to equitably apportion the losses caused by the insuror's failure.

3. The Court Order does not address the serious constitutional issues raised by the State's assertion of the right to simply seize claimant's business without the payment of compensation therefor. In *Neblett v. Carpenter*, 305 U.S. 297 (1938), the United States Supreme Court ruled that states could, without offending the United States Constitution, alter contractual provisions in insurance policies, but only if the policyholders were permitted to dissent. The dissenting policyholders were provided with the absolute right to receive a claim equal in sum to their loss and such claims were accorded priority in payment. Florida has presumably rejected the holding in the *Real Estate Marketers, Inc.* case and held that Receivers must accept or reject contracts as they find them. But in either case, the Constitutions of both the United States and Florida requires that D.R. Mertens, Inc. be compensated for its losses herein.

4. Alternatively, what has occured in this receivership is a taking by the state of D.R. Mertens, Inc.'s valuable contract right to act as general agents for Florida Home Insurance Co. In such event, this exercise of "eminent domain" or a regulatory taking, also consti-

tutionally compels compensation for D.R. Mertens, Inc.

Respectfully submitted:

LAW OFFICE OF ROBERT E. GIBSON
Suite 210 1020 East Lafayette Street
Tallahassee, Florida 32301
(904) 877-7139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Chester G. Senf, Esquire, 1323 Winewood Boulevard, Tallahassee, Florida, this 9th day of July, 1984.

STATE OF FLORIDA
DISTRICT COURT OF APPEAL
FIRST DISTRICT

D.R. MERTENS, INC.,

APPELLANT,

vs.

STATE OF FLORIDA, ex rel.,
The Department of Insurance
of the State of Florida,

APPELLEE

DOCKET NO. BD-210

INITIAL BRIEF OF D.L. MERTENS, INC.

ROBERT E. GIBSON
Suite 210
1020 East Lafayette Street
Tallahassee, Florida 32301
(904) 877-7139
Attorney for the Appellant

POINT 2

THE RECEIVER ANTICIPATORILY BREACHED THE CONTRACT BETWEEN MERTENS AND FLORIDA HOME INSURANCE COMPANY, WHICH WAS VESTED IN THE RECEIVER, BY ENTERING INTO THE REINSURANCE ARRANGEMENT WITH PROTECTIVE INDEMNITY INSURANCE COMPANY WHICH COULD NOT AND DID NOT INTEND TO RENEW THE MOBILE HOME POLICIES THEREBY IMPAIRING MERTENS' CONTRACT AND PLACING IT BEYOND THE RECEIVER'S ABILITY TO PERFORM AND THE RECEIVER IS LIABLE FOR DAMAGES FOR BREACH OF CONTRACT.

In this Court's decision in *Real Estate Marketers, Inc. v. Wheeler*, 298 So 2d 481 (Fla., 1 D.C.A., 1974), the Court quoted from 66 Am Jur 2d on receivers with approval:

> " '* * * Although a receiver can reject such a contract (executory), *he cannot impair it as between the parties thereto without giving rise to a cause of action for damages for the breach.* * * *' " (Emphasis supplied)

It is hornbook law that it is an anticipatory breach for one burdened by the duty of a contract to voluntarily place that contract beyond his ability to perform. In *Lee v. Wisconsin Physicians Service*, 252 NW 2d 24 (Wisc. 1977), the Wisconsin Supreme Court held that an insurer cannot defeat the agent's right to renewal commissions by writing the business directly with the insured at a reduced rate. D.R. Mertens' contractual rights, which were assumed by the Receiver in its continuation of the business, cannot be evaded by the simple strategy of assigning the business to

another company. D.R. Mertens, Inc., produced these policies and is entitled to the commissions contracted for.

In *Lovell v. St. Louis Life Insurance Company*, 111 U.S. 264, 4 S. Ct. 390, 28L Ed 423, where a life insurance company terminated its business and transferred its assets and policies to another company, it was held that this permitted the insured to treat the policy as cancelled and sue to recover premiums paid although performance on the part of the company was not yet due. There the Court said:

> "Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained."

See also *Crowell v. Northwestern National Life Insurance Company*, 99 Minn 214 (1906); *Israel v. Northwestern National Life Insurance Company*, 111 Minn 404 (1910); and *Macgregor v. Union Life Insurance Company of Omaha*, 121 Fed 493 (8 CCA).

This is exactly what the Receiver did in the present matter. A Receiver simply steps into the shoes of the entity it is operating with the same rights and obligations exactly. It can choose to honor or breach the contracts of the insurer. But once it breaches a contract, a claim must be allowed for the breach and not merely for what had been earned before the breach.

There can be no doubt that the Receiver impaired and breached the Mertens' contract. By taking the action which it did, the Receiver put Mertens out of business. Mr. Mertens testified without contradiction as to the effect the Receiver's action had on the corporation's business (T - 15). Mr. Mertens testified he was devoting his full time to the Florida Home business and wrote business for no other company (T - 15).

While the Receiver may impair the obligation of contract, there must be recompense for it. Two cases are instructive in this regard. In *Carpenter v. Pacific Mutual Life Insurance Company of California*, 74 P 2d 761 (Calif. 1938), a case in many respects similar to the instant case, the Insurance Commissioner of California was faced with the problem of a company which had a good book of life insurance, but many non-cancellable accident and health policies, issued at a rate inadequate to maintain lawful reserves, which rendered the company insolvent. Pursuant to court approval after lengthy hearings, a new company was formed with some of the assets of the old. The new company reinsured the life policies on the same terms as the old. The non-cancellable policies would continue at existing rates but with reduced benefits. However, it was provided in the case of non-consenting policyholders of both types that they could file a claim with the liquidator of the old company with the claims being paid in part with the assets of the old company and from profits of the new company.

Some of the policyholders appealed the court orders approving the proposal on the ground that the provisions of the insurance code dealing with insolvent insurance companies were unconstitutional in that they violated the due process, equal protection and the contract clause of the Federal Constitution. The California Supreme Court in upholding the proposal stated:

> "* * * The United States Supreme Court has unequivocally determined that a creditor or policyholder has no vested right in liquidation in event of insolvency. There is not property right, in the constitutional sense, in any form of remedy (citations omitted). *All the law requires as to a dissenter is that he receive the liquidated value of his contract rights without unreasonable delay* - he

has no right to immediate payment. * * *" (Emphasis supplied)

The Supreme Court of the United States, in affirming the California Court, held:

"* * * They are not bound, as were the dissenting creditors in *Doty v. Love*, 295 U.S. 64, 79 L Ed 1303, 58 S. Ct. 558, 96 A.L.R. 1438, to accept the obligation of the new company *but are afforded an alternative whereby they will receive damages for breach of their contracts.* * * *" *Neblett v. Carpenter*, 305 U.S. 297, 59 S. Ct. 355, 83 L Ed 437 (1938) at 305. * * *" (Emphasis supplied)

The teaching of these cases is that a Receiver *can* propose to alter contractual rights - substituting some new scheme for the old. But, the Federal Constitution (as well as Florida's Constitution) requires that, if there is restructuring, any party affected has the choice to insist upon its bargain and to be allowed a claim for his *full* damages. No less is acceptable constitutionally. Mertens must be allowed to dissent from the reinsurance arrangement and be allowed a claim for its full damages.

In the instant case, the Trial Court allowed Mertens' claim only for the amount which was earned under the contract prior to the company being placed in liquidation. There was no allowance for damages flowing from the breach when the Receiver by its reinsurance arrangement with Protective Indemnity voluntarily placed the contract beyond its ability to perform thereby resulting in the destruction of Mertens' business.

Paragraph 18 of Mertens' contract provides for liquidated damages for a period of five (5) years.

Based on this paragraph, Mertens' claim would therefore be for the following amount, excluding interest which was waived at the hearing:

A. Balance of commissions due for calendar year 1977	$ 11,566.33
B. Balance of commissions due for calendar year 1978	52,670.30
C. Liquidated damages for anticipatory breach of contract based on provisions of Paragraph 18 reduced to present value (based on commissions for the calendar year 1978) at 6%	290,198.76
TOTAL CLAIM	$354,435.39

In the alternative, Mertens, by the uncontradicted testimony of Mr. Odell Turner, shows that Mertens had made an average profit of $40, 166 during the years Merten had been solely representing Florida Home (T -39).

Using this alternative basis for computing Mertens' claim, the figures would be:

A. Balance of commissions due for calendar year 1977	$ 11,566.33
B. Balance of commissions due for calendar year 1978	52,670.30
C. Balance of commissions due for "runoff" period in 1979 (T - 88)	31,837.00
D. Damages for anticipatory breach of contract based on average lost profits for five (5) years	200,830.00
TOTAL	$296,903.63

> The Receiver has contended that there was no anticipatory breach and the damage too speculative. However, the Supreme Court has said with respect to uncertainty of damages in *McCall v. Sherbill*, 68 So 2d 362 (Fla 1953):
>
> "There are many types of cases in which the damages may be certain, but the amount of damages may be uncertain. However, such uncertainty will not necessarily preclude recovery."
>
> * * *
>
> "In the case of *Rynveld v. Dupuis*, 5 Cir. 39 F 2d 399, the Court held that damages are not rendered uncertain because thay cannot be calculated with absolute exactness. *It is sufficient that there be a reasonable basis of computation although the result may only be approximate.*" (Emphasis supplied)

Here Mertens' damages may be computed on the basis of the liquidated damages clause in Paragraph 18 of its contract or, in the alternative, on the basis of lost profits. See *Beefy Trail, Inc. v. Beefy King International, Inc.*, 267 So 2d 85-3 (4DCA 1972).

The stipulation between the parties (R-86-99) showed that earned premiums produced by Mertens' efforts increased from $1,229,313.11 in 1977 to $1,557,993.15 for 1978, even though additional writings were not permitted after the Department of Insurance seized the company (T-16) and the loss ratio was excellent (T - 14). It is reasonable to presume that earned premiums would have continued to increase had the contract continued in force. Hence, whether one uses the liquidated damages alternative based on 1978 figures or the average profit figure based on three (3) years, it appears that either is a reasonable basis for computation of Mertens' claim.

The Trial Court, in its Final Order on Mertens' claim, did not directly address the question of an anticipatory breach and, therefore, only allowed the claim for commissions which were earned before Florida Home reinsured the policies. The Court thus erred and should be reversed. Since the evidence was not contradicted, this Court should also fix the amount of Mertens' claim.

POINT 3

UNDER BOTH THE FLORIDA AND FEDERAL CONSTITUTIONS, MERTENS WAS UNCONSTITUTIONALLY DEPRIVED OF ITS CONTRACT RIGHTS WITHOUT PAYMENT OF FULL COMPENSATION.

Both Article X, Section 6(a) of the Florida Constitution and the Fifth Amendment to the United States Constitution prohibit the taking of property for a public purpose without the payment of full compensation.

Here, the State of Florida through the Department of Insurance as Receiver of Florida Home Insurance Company, pursuant to the State's power to regulate insurers has deprived Mertens of its contract rights so that policyholders of Florida Home would not suffer interruption of coverage, or loss of unearned premiums, and agents would not lose unearned commissions and payments and servicing of claims could be resumed. See Paragraph 2 of Receiver's Petition (R - 15).

As has been pointed out above, contract rights may be impaired or taken, but not without full compensation therefor. *Neblett vs. Carpenter*, supra. However, in the instant situation, Mertens' contract rights were taken and Mertens' business was destroyed by the Receiver's actions and the Receiver has sought to limit damages to be paid to

Mertens to solely those amounts due before the breach and to allow nothing as a result of the breach.

The Trial Court upheld the Receiver's recommendation and, therefore, Mertens will not receive full compensation for its loss. This is analogous to saying that if a contractor was engaged to build a house and had done some work on it, the owner, without fault on the part of the contractor, could employ another to finish the house and pay the contractor for only that which he had done so far and not damages for the remainder of the contract.

As has been shown in POINT 2, Mertens is constitutionally entitled to full compensation, not less, and full compensation would be those damages arising before breach as well as those flowing from the breach, either on the basis of the liquidated damages clause or on the basis of lost profits as set forth above.

In the instant case, where the policyholders and other claimants got paid in full, the agents got paid in full and the Receiver was even paid a ceding commission of 35%; the only entity impaired was Mertens, who was wiped out.

For the taking to be upheld, it must be assumed that it was for a public use. That this was a taking for public purpose is shown by the provisions of Chapter 631, Florida Statutes. Section 631.1001(4) provides that the purpose of the Insurers Rehabilitation and Liquidation Act is "the protection of the interests of insureds, creditors and the public generally." The Receiver was vested with the contract rights by virtue of Section 631.152 and the court's order. Thus, Mertens' property was taken for a public purpose by government action.

It is, therefore, respectfully submitted that Mertens has been deprived of property for public purpose without the payment of full compensation and that the order of the Trial Court should be reversed.

CONCLUSION

Based on the foregoing, Mertens' contract rights were taken by the Receiver for a public purpose without full compensation therefor as required by both the Florida and United States Constitutions.

The Receiver assumed Mertens' contract and voluntarily put it beyond the Receiver's ability to perform, thereby breaching the same. The Trial Court erred in allowing Mertens' claim for only those damages incurred before the breach and not damages for the breach.

Therefore, the order of the Trial Court should be reversed and Mertens' claim allowed for the full amount.

DATED this 15th day of January, 1985.

Respectfully submitted,

ROBERT E. GIBSON
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1020 East Lafayette Street
Tallahassee, Florida 32301
(904) 877-7139

Attorney for Claimant

DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

D.R. MERTENS, INC.,

Appellant,

vs.

STATE OF FLORIDA, EX REL.,
DEPARTMENT OF INSURANCE,

Appellee

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED.

CASE NO. BD-210

Opinion filed November 15, 1985.

An Appeal from the Circuit Court for Leon County.
Charles E. Miner, Jr., Judge

Robert E. Gibson, Tallahassee, for Appellant.

Chester G. Senf, Tallahassee, for Appellee.

ERVIN, J.

Appellant, the agency representative of an insolvent insurance company, appeals a final order approving the receiver's recommendation on the claims of the representative, recommending payment to appellant for earned but unpaid commissions during the calendar years 1977 and 1978, but denying all claims for commissions allegedly due to the representative pursuant to the representative's contract for commissions with the insolvent insurer after the date of receivership. We affirm.

On December 23, 1975, appellant and the subsequent insolvent insurer, Florida Home Insurance Company (Florida Home), entered into a representative agreement granting appellant Mertens the authority "to solicit and appoint insurance agents for such contracts of insurance covering risks on mobile home insurance coverages and related lines" as Florida Home "has authority lawfully to make". The contract provisions relevant to this appeal state:

> 5. CONTINGENT COMMISSIONS:
> In addition to advance commissions otherwise payable, the COMPANY hereby agrees to pay the REPRESENTATIVE a contingent commission as respects all policies or premium installments on all classes of mobile home business that the COMPANY has lawful agents or their successors or assigns originally appointed by REPRESENTATIVE and which shall be computed as follows:
>
> a. If, in any accounting period, the ratio of losses incurred to premium earned on all policies issued by any agents or their successors or assigns originally appointed by REPRESENTATIVE is

1. less than twenty-five percent (25%), the contingent commission due and payable shall be five percent (5%) of the earned premium for the accounting period;

2. greater than twenty-five percent (25%), then the contingent commission due and payable shall be determined by adding one-fourth (F) of one percent (1%) for each point the loss ratio is below forty-five percent (45%). This resulting percentage will be paid on the earned premium for the accounting period;

3. greater than forty-five percent (45%), then there is no contingent commission due for the accounting period.

12. The provisions of this contingent agreement pertain to all policies issued by any agent or his successors or assigns originally appointed by REPRESENTATIVE whether written under the original agency agreement or a replacement or succeeding agreement or by a subsidiary of the COMPANY or through a "fronting" or reinsurance arrangement with the COMPANY or through a bordereau arrangement or contract with another company.

18. If this representative agreement between the COMPANY and the REPRESENTATIVE is cancelled by either party for *any reason* whatsoever *with or without cause, the Contingent Commission portion of this Agreement shall be in full force and effect for five (5) full accounting periods after such cancellation of the contract.* The COMPANY shall pay all contingent commissions for a

> period of five (5) calendar years. At the end of five (5) accounting periods or (5) calendar years if all monies due the REPRESENTATIVE have been paid, this Agreement shall automatically expire and no further payment by the COMPANY is due or payable to the REPRESENTATIVE.

(e.s.)

On October 12, 1978, an order of seizure was entered pursuant to Section 631.361, Florida Statutes, directing the Department of Insurance (Department) to take possession and control of the financially troubled insurer's property, books, accounts, bank accounts and premises. Subsequently, on December 11, 1978, the lower court found Florida Home impaired within the meaning of Section 631.011(3) and (4), Florida Statutes, and appointed the Department as receiver of Florida Home for purposes of rehabilitation. Among other things, *the receiver was directed to conduct the business of the insurer* and to negotiate with insurance companies for the purpose of attempting to have policies of insurance presently in force, assumed or reinsured into an acceptable insurance carrier. The court further provided that all policies of insurance issued by Florida Home would remain in full force and effect until further order of the court.

After attempts were unsuccessfully made to restore Florida Home to a financially solvent condition, the receiver petitioned the court for an order authorizing the receiver to enter into a reinsurance treaty and supplemental agreement with Protective Indemnity Insurance Company of Florida (Protective), which, among other things, assigned all outstanding mobile home insurance policies of Florida Home, including all policies written by agents of appellant, to Protective for the purpose of processing and paying claims, and authorized Protective to service all policies reinsured by it. Protective is not a carrier which

insures mobile homes, and the policies in effect as of the date of the order appointing the receiver (December 11, 1978), including those written by appellant's agents, were allowed to lapse, run out and Protective neither rewrote nor renewed them.

Following a subsequent order of liquidation, notifying all persons having claims against Florida Home to timely file such claims with the receiver, appellant filed a claim for all earned but unpaid commissions for the years 1977 and 1978, and, pursuant to paragraph 18 of its contract with Florida Home, sought additional compensation for renewal commissions over a period of five calendar years thereafter, which, when reduced to present value at six percent as of December 31, 1979, resulted in a total claim of $358,825.18.[1]

Both the receiver and the lower court found that appellant was entitled to his claim for earned but unpaid commissions for the years 1977 and 1978 in the amount of $64,236.63, but, because the evidence showed that Mertens' agents produced no new business for Florida Home after December 1978, and because Protective did not renew any policies written by Mertens' agents after that date, denied the claim for contingent commissions for the five years following the date of liquidation.

The first two issues raised by Mertens are (1) whether the receiver was burdened with all the obligations associated with the policies, including appellant's agency contract with the insolvent insurer, and (2) whether the receiver anticipatorily breached the contract between appellant and Florida Home Insurance Company by assigning all mobile home insurance policies to an insurer which failed to renew them or otherwise protect appellant's interest in future renewal commissions, as provided for in its contract with Florida Home. Essentially, Mertens argues that when the Department was appointed as receiver

of the assets of Florida Home, it thereby stood in the shoes of Florida Home and necessarily assumed all rights and obligations of the business, including the obligation to pay to the representative contingent commissions for five full accounting periods after the cancellation of the contract.

In answer to appellant's arguments asserted under points I and II, we respond that the law is clear that there can be no breach, anticipatory or otherwise, of an executory contract by a receiver unless the receiver specifically elected to be bound thereby. See *Real Estate Marketers, Inc. v. Wheeler*, 298 So2d 481, 483 (Fla. 1st DCA 1974). Moreover, since the receiver was court-appointed, it needed approval by the court to maintain the contract with appellant. *American Automatic Co. v. Harbour Towers Development Corp.*, 227 So2d 94, 95 (Fla. 3d DCA 1969). Although the order appointing the Department as receiver for purposes of rehabilitation directs the receiver to maintain in full force all policies of insurance or similar contracts of coverage issued by Florida Home until further order, the order *did not grant approval to the receiver to maintain the representative agreement between appellant and Florida Home.* Moreover nothing in the record reflects that the receiver elected to be bound by the terms of appellant's contract with Florida Home, even though the receiver had notice of that contract as early as October 31, 1978. Finally, Section 631.291(4)(b), Florida Statutes (1975),[2] grants the receiver the right "to cancel any contract or part thereof by virtue of any contractual provision or law of this state".

The general rule is that insurance agency contracts ordinarily imply that the agent's right to commissions on renewal premiums is conditioned upon the insurance company's continued operation in business. Thus, it is generally recognized that an agent's right to commissions on renewal premiums is lost when the insurance company ceases to do business. *See Annot.* 36 A.L.R.3d 958, 965-966 (1971). For

example, in *Layton v. Illinois Life Insurance Co.*, 81 F2d 600 (7th Cir.), *cert. denied*, 298 U.S. 681, 56 S.Ct. 949, 80 L.Ed. 1401 (1936), the court was confronted with the question of whether a life insurance agent under a contract for post-agency renewal commissions was entitled, upon receivership of the insurance company, to recover the present value of such commissions on renewal premiums which, it was alleged, the company, had it continued in business, would have received in due course. The Seventh Circuit Court of Appeals concluded that the appellant's right to commissions on future premiums was at all times a prospective right that was contingent upon payment being made by the holders of the contracts of insurance, and therefore it was within the reasonable contemplation of the parties that the agent's right to renewal commissions was subject to the continued existence of the company and the continued collection of the premiums:

> The very nature of the agency contract impels the conclusion that it must have been within the contemplation of the contracting parties that the company might some day become incapacitated from continuing in the insurance business. When the district court assumed jurisdiction over the affairs of the company and appointed a receiver, we think this amounted to a termination of the contract by operation of law reasonably within the contemplation of the parties and not an actionable breach on the part of the company.

81 F.2d at 602.

We similarly regard the agency contract before us as reasonably implying the continued existence of the insurance company, because the parties must have reasonably contemplated that the continued payment of any such commissions depended upon the actual collection or receipt of the premiums by the company. Paragraph 5 of the con-

tract, pertaining to the agent's right to contingent commissions, bound the company to pay to the representative contingent commissions on all classes of mobile home business that the company has "lawful authority to write". (e.s.) Obviously if the company is in receivership it no longer retains the lawful authority to issue insurance on mobile homes. *See also Myers v. Protective Life Insurance Co.*, 342 So.2d 772, 777 (Ala. 1977). This position was forcefully reiterated in *People ex rel Palmer v. Peoria Life Insurance Co.*, 376 Ill. 517, 34 N.E.2d 829, 136 A.L.R. 151 (1941), recognizing that contracts of agents necessarily, and as a matter of law, are dependent for their continued existence upon the viability of the insurance company, and that the parties must be conclusively presumed to have entered into the agency contract in contemplation of the future possibility of the company's insolvency and liquidation under the Illinois Liquidation Act. Consequently, upon the occurrence of such possibility, the agency contract is also necessarily terminated.

The *Palmer* court also addressed the same argument raised by appellant at bar: that the reinsurer, in taking over the business and assets of the insolvent insurance company, thereby assumed all the burdens of the business, and stood in place of the former company and became liable for all renewal commissions agreed to in the contract. The court observed that the reinsurance contract entered into between the reinsurer and the policyholders of the insolvent company did not obligate the reinsurer to pay the former agents of the insolvent company any services rendered their former employer.

As to appellant's argument that it was unconstitutionally deprived of its contract rights without payment of full compensation, we respond that insurance agents do not have a vested interest in future premiums against insolvency receivers. Moreover, Mertens can make no valid

argument that the actions of the receiver impaired the obligation of his contract, contrary to the constitutional prohibition, since all relevant provisions of Chapter 631 were in effect at the time of the contract's formation under which Mertens seeks contingent renewal commissions. By operation of law, such provisions became part of the contract. See *Springer v. Colburn*, 162 So.2d 513 (Fla. 1904).

Affirmed.

SHIVERS & JOANOS, JJ., CONCUR.

FOOTNOTES:

[1] Appellant presented an alternative basis for assessing future damages, based on evidence revealing that appellant's average annual income for the 1976-1979 fiscal years was $40,166.00, which, for the five-year period, totaled $200,830.00.

[2] This provision is now codified at Section 631.192(2)(b), Florida Statutes.

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

D.R. MERTENS, INC.,

Appellant,

vs.

STATE OF FLORIDA, EX REL.,
DEPARTMENT OF INSURANCE,

Appellee

CASE NO. BD-210

MOTION FOR REHEARING
OR
REHEARING EN BANC

MOTION FOR REHEARING OR REHEARING EN BANC

The Appellant, D.R. MERTENS, INC., by counsel, moves the Court for a rehearing or rehearing en banc and respectfully represents:

1. The Court has overlooked the provision of F.S. 631.291(4)(a)[1981] and the federal constitutional limits on the power of Receivers (and the State generally) involved in cancelling or retaining contracts of the entity placed in Receivership. Yes, the Receiver has the right to cancel contracts: but, if a contract is cancelled THERE *MUST* BE FULL DAMAGES ALLOWED FOR THE ENSUING BREACH OF CONTRACT. This is a constitutional requirement: *Neblett v. Carpenter*, 305 U.S. 297, 83 L. ed. 182 (1938). The Receiver does not acquire, through the status of being Receiver, any other rights, duties and obligations than that of the company. Thus the Receiver must accept or cancel each and every contract and other binding agreement of the company, and as to each agreement, must either perform or allow damages (to be paid as any other claim) therefor. See also, *Carpenter v. Pacific Mutual Life Ins.*, 74 P. 2d 761 (Cal., 1937) at page 768 et seq, holding that it is constitutionally necessary for the Receiver to allow dissenting policyholders (those who would not agree to a re-written policy with a new company) a claim for the full amount of the damages which they suffered, which was to be paid pro-rata with the other claims in the Receivership. In fact, in this Case, the Order of Liquidation, (R-44-74) in paragraph 10 cancels all contracts with agents (D.R. MERTENS, INC., being the managing general agent of the company, pursuant to contract). Thus, the contract was ultimately rejected, and actual damages suffered must be allowed to the Appellant, D.R. MERTENS, INC. F.S. 631.291(4)(b) [1981].

F.S. 631.291(4)(a) [1981] recognizes that the Receiver may cancel contracts, but requires that:

> "Recovery by any claimant under this subsection shall be limited to the actual damages suffered by virtue of the breach."

F.S. 631.291(4)(b) [1981] requires:

> "That every claimant under this subsection mitigate and minimize any damage suffered as a result of a breach of contract, upon entry *of the order of liquidation.*" (e.s.)

The authority of the Receiver to reject executory contracts at the time of this receivership is continued in F.S. 631.291(4)(b) [1981]. The same statute granting the authority requires that upon such breach "actual damages" be paid.

The statute itself states the rule of law applicable to this matter:

> a rejection of executory contracts, authorized by the statutory authority, and executed by Court Order, results in a breach and damages, together with a duty on the part of the claimant to *mitigate and minimize damages.* (Emphasis supplied)

It is impossible to minimize or mitigate one's *past* damages. Therefore, this statute can *only* refer to future as well as past damages, when referring to actual damages.

Finally, the Legislature requires that in the event of such rejection, the claimant receive its actual damages, which the statute itself clearly admits includes both future and past damages.

The statute thus requires that D.R. MERTENS, INC. be allowed its "actual damages" due to the ultimate cancellation of its agency contract.

The Receiver on page 17 of its brief admits that "actual and compensatory damages are synonymous and are damages awarded for loss sustained by an injured party due to the other party's breach." *Mercury Motors Express, Inc. v. Smith* 393 So 2d 545 (Fla 1981).

In 17 Fla Jur 2d, Damages, Section 16, it is stated:

> "xxx Accordingly, *where there is a total breach of a contract, all the damages, past or future, which are reasonably certain to occur* to the plaintiff may, as a general rule, be recovered in a single action. This is also generally true in the case of an anticipatory breach as where one party incapacitates himself from performance or unequivocally refuses to perform." (Emphasis supplied)

This Court in its opinion has said that the Receiver may reject MERTENS' contract and pay only for past damages.

In 17 Fla Jur 2d, Damages, Section 28, the measure of such damage is stated to be:

> "Where the breach of a contract consists in repudiating it or otherwise preventing its performance, without the fault of the other party, who is willing and able to perform it, the latter may recover the value of the contract to him at the time of the breach. *Thus, he may affirm the contract and insist on the benefit of its bargain, seeking those damages which will place him in the position he would have been in if the contract had been completely performed.* As a general rule, the measure of damages where performance is prevented is the difference between what it would have cost to perform the contract and the contract had the contract been entirely executed. xxx" (Emphasis supplied)

> See also *Beefy Trail, Inc. v. Beefy King International, Inc.* 267 So 2d 853 (4 DCA 1972).

The evidence introduced below and the authorities cited by D.R. MERTENS, INC., establish the basis for the damages claimed. The citations by this Court to *Real Estate Marketers* and other cases fail to establish the legal point which the Court cites these cases for on page five of the opinion. Let us briefly examine a hypothetical:

> A policyholder holds a policy which is bona fide, regular and valid. The Receiver does not specifically elect to be bound by the contract.

Ergo, under the holding of this Court on page five, there is no breach of this contract upon the policy's cancellation. This cannot be the law, and is certainly unconstitutional and confiscatory if so applied. There is no authority in the law for the Court and the Receiver to refuse to either allow a general claim for breach, or perform the obligations of an entity administered under the insurance liquidation code. The Court has by this opinion, as it stands, given the Receiver a power unknown in the legal system of this country: a right to, on an ex post facto basis, destroy valid contracts without allowing a claim (to be paid pro rata, along with other claims) for the breach. In an analogous situation, the Federal Bankruptcy Code, the U.S. Supreme Court has held that a Trustee may in certain instances alter contractual rights of secured parties, but, if this is done, the indubitable equivalent of the contractual rights held must be provided to the party whose contract is affected thereby. In re *American Kitchen Foods*, 9 CBC 537 (N.D. Me. 1976).

Moreover, §502(g) of the Bankruptcy Code provides:

> "A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, or 13 of this title, of an executory contract or

> unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

Additionally, this Court has misconstrued the case of People ex rel Palmer v. Peoria Life Insurance Company, 376 Ill. 517, 34NE 2d 829, 136 ALR 151 (1941). Mertens does not seek to collect from any funds except those in the hands of the Receiver. The Court there stated succinctly Mertens' alternative contention:

> "From that moment (the liquidation order) the Peoria Company had no further corporate power for any purpose for which it had been organized. It could not employ agents, issue policies of insurance, accept premiums or pay claims. *Every contract which had been made was disaffirmed and every contracting party reduced to such claim as he might have against the receiver.* " (Emphasis Supplied)

2. The Court has also misinterpreted the law stated in a previous relevant case from this Court, *Real Estate Marketers v. Wheeler*, 298 So. 2d 85 (Fla. App. 1 D.C.A., 1974). This is an important case from this Court which discusses the Receiver's assumption of contracts. The case involves a factual pattern similar to the one at hand. Like the Receiver in Florida Home, the Receiver in the *Marketers* Case was ordered by the Court to continue the business of the company. The Circuit Court required the *Real Estate* receiver to accept or reject "all previously executed contracts of sale." The Receiver elected to accept a particular sale. This sale was negotiated by a broker. The *brokerage contract* had *not* been specifically accepted pursuant to an Order of the

Court. *Real Estate Marketers* at page 483. Nevertheless, this Court held that the Receiver, having accepted the benefits of the deal, was bound by all of the component parts of the transaction, despite the Receiver's "election" (which was not found to be lawful) only to pay the commission in part. The Court in so holding cited 66 *Am. Jur* Receivers §66:

> Although a receiver can reject such a contract [executory], *he cannot impair it as between the parties thereto without giving rise to a cause of action for the breach. Real Estate Marketers*, 298 So. 2d at 483 (Emphasis supplied)

D.R. MERTENS, INC. submits that under the rule of *Real Estate Marketers*, the Receiver, despite lack of an Order describing Mertens' agency contract specifically, as one to be adopted, adopted the contract as a matter of law when it was ordered to continue the business of Florida Home and continue the policies. (R-8-11) Paragraph 1). In fact, all of the agents of Florida Home *were paid their commissions in full* despite the lack of an order naming each agent specifically and continuing their right to receive commissions. Why such an Order was not obtained, nor thought necessary by anyone, was that the Order of Judge Silver continuing the conduct of the business (Paragraph 1) and specifically providing for the policies to remain in force (Paragraph 17) *of itself* continued all of the rights and obligations under the contracts of the insurer itself, without the need of any other action by the Court. This is precisely because the Receiver, as stated in the *Real Estate Marketers* opinion, must take the contract (the policies) as it finds them, exactly. It is extremely troubling to Appellant that *each and every other agent* writing mobile home business (all of whom were appointed by D.R. MERTENS, INC. (TR-26) were paid their commissions, per their contracts, in full, (TR-25), and that the Court approved

accountings and other reports detailing the fact that the agents were being paid, but that D.R. MERTENS, INC. was not so paid, despite, as this Court found, that it was on specific notice of the contract that D.R. MERTENS, INC. had with the company. If the Receiver and the Circuit Court felt that there was adequate authority to pay every other agent (who were again, in actuality appointed by D.R. MERTENS, INC.) without a specific order continuing each and every agent, under the general mandate of the Court to continue the business and policies of the company, why was D.R. MERTENS, INC., the only agent not paid its commission? Why does the authority for the other agents to be paid and continued, by the same force of logic, and by the same Order, not continue MERTENS' contract and lead to the conclusion that the contract was assumed? Appellant submits that there is no good reason to justify the Receiver's refusal to provide for D.R. MERTENS, INC.'s contract.

Having been ordered to continue the policies of Florida Home, the Receiver, under the provisions of the statutory and other law of Receivers, *must* at this time allow damages for its decision. It is a specifically stated goal and statutory requirement of the Insurance Rehabilitation and Liquidation Act, to equitably apportion unavoidable loss: why D.R. MERTENS, INC. should have to suffer and take so great a part of the loss herein while the other agents were paid everything that their contracts required, is simply not understandable, equitable, or constitutional. Nor is it the law as the legislature mandated for contract claims. See F.S. 631.291 (4)(a) [1981].

3. This Court has failed to apprehend the distinction between a statutory receiver, receiving its authority pursuant to statute, and an equity receiver appointed by the Court. Sections 631.051, 631.061, 631.071, 631.081 and 631.091, F.S., all require that the Department of Insurance be appointed as receiver to rehabilitate or liquidate a

domestic or foreign insurer. Section 631.141, F.S., vests the Department, if a domiciliary receiver, with the title to all property and contracts of the insurer and other sections provide the method and manner of liquidation and payment of claims. An equity receiver on the other hand does not have title to the assets of the entity in receivership and has only those powers conferred by the Court. Section 44 Fla Jur 2d, *Receivers*, §§23 and 30.

Hence, there is a substantial and decided difference between an equity receiver and a statutory one. It is inconceivable that a statutory receiver can be vested with the title to a contract without having the burdens which accompany it. Therefore, unless the receiver rejects the contract to which it has title, it would still have the obligation to perform it.

And, if it rejects the contract, pursuant to §631.291(4)(a) it must allow a claim for actual damages. It was not until the Order of Liquidation dated March 7, 1979, that the agents of the Company were discharged, long after the Receiver had, pursuant to the authority of the Order dated January 12, 1979, reinsured all of the Company's business with Protective Indemnity.

4. This Court has misinterpreted §631.291(4)(b) F.S. [1981] and its construction has, in effect, resulted in rendering the statute unconstitutional as violative of the Fifth and Fourteenth amendments to the United States constitution as well as Article I, Section 10 and Article X, Section 6 of the Florida Constitution.

What this Court has held in its decision is that simply because a receiver was appointed, the receiver could take the property rights which MERTENS had in its contract with the insurer and destroy them without the payment of future damages - even from the funds that MERTENS' efforts partially created.

Courts are required to construe statutes so that they are applied constitutionally. The plain meaning of the statute, as discussed above, is that the statute requires the payment of actual damages upon the impairment of a contract by the receiver, i.e., both past and future damages.

Even though MERTENS' contract was cancellable by either party without cause upon proper notice, the contract provided for liquidated damages upon the very contingency which actually occurred - the reinsuring of the business with Protective Indemnity. (See page 4 of opinion)

For the reasons set forth above, this Court should grant a rehearing or rehearing en banc to correct the errors in this opinion.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance since it will affect the Receiver's allowance of claims on all non-policy contracts with the various insolvent insurers now being or hereafter administered by the Department of Insurance as Receiver. I further express the belief that the panel decision is contrary to the decision of this Court in the case of *Real Estate Marketers, Inc. v. Wheeler* and that a consideration by the full court is necessary to maintain uniformity of decisions in this Court.

Respectfully submitted this 2nd day of December, 1985.

ROBERT E. GIBSON
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(904) 877-7139

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to CHESTER G. SENF, ESQUIRE, Post Office Box 110, Tallahassee, Florida 32302, this 2nd day of December, 1985.

ROBERT E. GIBSON
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Attorney for Appellant

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32301
Telephone No. (904) 488-6152

DATE DECEMBER 18, 1985
CASE NO BD-210

D.R. MERTENS, INC. Appellant/Petitioner

vs

STATE OF FLORIDA, ex rel., DEPARTMENT OF INSURANCE Appellee/Respondent

ORDER

Motion for rehearing is DENIED.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following: Robert E. Gibson, Esquire, Tallahassee, Florida; Herbert R. Kraft, Esquire, Tallahassee, Florida; Chester G. Senf, Esquire, Tallahassee, Florida.

Supreme Court of Florida

WEDNESDAY, APRIL 16, 1986

D.R. MERTENS, INC.,

Petitioner

vs

STATE OF FLORIDA, EX REL., DEPARTMENT OF INSURANCE

Respondent.

CASE NO. 68,188

District Court of Appeal,
First District No. BD-210

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, C.J., OVERTON, MCDONALD AND EHRLICH, J.J., concur
ADKINS, J., dissents

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Paul Hartsfield, Clerk
Hon. Charles E. Miner, Jr., Judge

Kenneth J. Muszynski, Esquire
Chester G. Senf, Jr., Esquire

IN THE SUPREME COURT OF THE STATE OF FLORIDA

D.R. MERTENS, INC.,

APPELLANT,

vs.

STATE OF FLORIDA, ex rel.,
The Department of Insurance
of the State of Florida,

APPELLEE

NO. 68,188

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that D.R. MERTENS, INC., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida, declining jurisdiction to review the final order on claim, entered in this action April 16, 1986.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

KENNETH MUSZYNSKI
Suite 210
1020 East Lafayette Street
Tallahassee, Florida 32301
(904) 877-7139

Counsel for APPELLANT

IN THE SUPREME COURT OF THE STATE OF FLORIDA

D.R. MERTENS, INC.,

APPELLANT,

vs.

STATE OF FLORIDA, ex rel.,
The Department of Insurance
of the State of Florida,

APPELLEE

NO. 68,188

STATE OF FLORIDA

COUNTY OF LEON

BEFORE ME, the undersigned Notary Public, personally appeared KENNETH MUSZYNSKI, who after being duly sworn, deposes and says:

All parties to be served with a copy of this notice have been served. Specifically, service was made upon CHESTER G. SENF, ESQUIRE, Counsel of Record for the State of Florida, ex rel., the Department of Insurance of the State of Florida, by mailing a copy of the notice to him by regular U.S. Mail at Post Office Box 110, Tallahassee, Florida 32302, this 13th day of June, 1986.

FURTHER AFFIANT SAYETH NAUGHT.

KENNETH MUSZYNSKI
Suite 210
1020 East Lafayette Street
Tallahassee, Florida 32301
(904) 877-7139

Counsel for APPELLANT

SWORN TO and subscribed before me
at Tallahassee, Leon County, Florida,
this 13th day of June, 1986.

NOTARY PUBLIC

My Commission Expires: 3-20-1988